U.S. Department of Labor

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Date: March 24, 2000

Case No.: 1997-ERA-43

In the Matter of

KEVIN R. DOODY,

Complainant,

v.

CENTERIOR ENERGY, *et al*,
Respondent

APPEARANCES:

Merrie Frost, Esq.
Mentor, Ohio
For the Complainant

Richard P. Goddard, Esq.
Calfee, Halter & Griswold
Cleveland, Ohio
For the Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. § 5851, *et seq.*, and the regulations at

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Title 29 of the Code of Federal Regulations. (AX. 1)[1] The ERA protects employees in the nuclear power industry from employment discrimination resulting from commencing, testifying at, or participating in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq.*

The Complainant, Kevin R. Doody, filed a complaint under the ERA on March 31, 1997. The Complainant alleged that he was terminated for reporting safety concerns related to the Radiation Protection Program at the Perry Nuclear Power Plant to supervision and management, the company ombudsman, and the Nuclear Regulatory Commission. He further alleged that he had been subject to harassing, intimidating, and discriminatory treatment beginning in November of 1995 and culminating in his termination on March 19, 1997. (AX. 1)

After an investigation, the Occupational Safety and Health Administration determined that the Complainant's termination was not retaliatory for his involvement in safety/health protected activity, but instead was due to work performance and insubordination. (AX. 1) Mr. Doody timely appealed this determination and requested a hearing. (AX. 2) A formal hearing in this matter was held from July 24, 1997, through July 29, 1997. Thereafter, a Motion by the Complainant to Reopen the Record was granted, and a second hearing was held on January 28, 1999.

ISSUES:

1. Whether the Complainant engaged in activity protected under the ERA; and,
2. Whether the Respondent had legitimate, nondiscriminatory, non-pretextual reasons for taking adverse action against the Complainant.

FINDINGS OF FACT:

The Respondent, Centerior Energy Corporation, is the parent company of the Cleveland Electric Illuminating Company (CEI). CEI is licensed by the Nuclear Regulatory Commission to operate the Perry Nuclear Power Plant in Perry, Ohio. It was at this facility that the Complainant, Kevin Doody, was hired by CEI as an Engineer-Nuclear on August 14, 1995. (Tr. 360)

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He was hired into the Radiation Protection Section as part of CEI's new ALARA/Radiological Engineering Unit (AREU). Id. This unit was created to provide centralization and expertise to the ALARA[2] program while lessening the burden of dealing with ALARA issues on other units within Perry. (Tr. 590) The Complainant was hired based on his degree in chemical engineering and his ALARA-related experience at other nuclear facilities. (Tr. 592)

The Complainant worked under the supervision of Sun Lee, the ALARA Radiological Engineering Superintendent. (Tr. 51-52) Sun Lee worked under the supervision of Pat Volza, the Radiation Protection Section Manager. At some point, the relationship between Sun Lee and the Complainant became acrimonious, with the Complainant being openly critical of Sun Lee's competency as a supervisor to his peers and management. (Tr. 958, 1122-23, 1254)

On October 16, 1995, the Complainant was assigned to conduct a Human Performance Enhancement System (HPES) evaluation of a tool contamination problem the plant was experiencing. According to the Complainant's understanding of CEI's procedures, radiological surveys of tools prior to storage were to be performed exclusively by Health Physics technicians. (Tr. 373) During the course of his evaluation, however, the Complainant believed he discovered that Health Physics supervision had directed non-qualified technicians to perform these surveys. (Tr. 374)

The Complainant met with Pat Volza on October 18, 1995, to discuss this finding, and the Complainant was told that the problem would be handled. (Tr. 374, 390) The Complainant continued his investigation and completed his report during the last week of November. (Tr. 392) A few days after submitting his draft for comment and review, the Complainant and Volza discussed the report and made changes to the Complainant's recommendations. (Tr. 393, 408, 620) The Complainant testified that in early December, Sun Lee reprimanded him for making too big a deal of the HPES and informed him that his teamwork was in question. (Tr. 411) On December 30, 1995, the Complainant's report was approved and issued to the company.

On January 21, 1996, the plant was scheduled to begin a sixty-three day refueling outage. (Tr. 428) During this refueling outage, referred to within the plant as "RFO5", plant personnel were assigned to various positions to support the endeavor. On January 2, 1996, the Complainant was assigned to the Health Physics Planning Element (HPPE). (Tr. 419) The Complainant was assigned to this unit based on his experience and because the HPPE supervisor, Donald Forbush, had worked with him in the past. (Tr. 873, 886) The Complainant testified that HPPE had a reputation as a tough work assignment given the reluctance of those employed there to assist newcomers. (Tr. 416; CX. 2) Further, there was testimony that the HPPE employees feared that the Complainant and his co-workers were being brought in to replace them. (Tr. 909) Given this environment, George Sutton, a Radiation Protection Section supervisor and

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friend of the Complainant, met with his superior and alleged that the Complainant had been assigned to HPPE in order to fail. (Tr. 788) However, I find no evidence in the record, other than the allegation itself, that this assignment was disingenuous. Given the Complainant's experience and prior work with the supervisor, his assignment to the HPPE unit appears logical and without animus.

Soon after his arrival in the HPPE, the Complainant notified Sun Lee that this department was behind in issuing the reports necessary to allow the work to proceed during the refueling outage. (Tr. 424) The Complainant alleged that within days of his arrival, Donald Forbush was blaming him for these delays even though these reports were scheduled to be issued prior to his appointment. (Tr. 425)

Several of the Complainant's co-workers testified concerning his alleged lack of productivity while assigned to the HPPE unit. The HPPE supervisor, Donald Forbush, testified that the Complainant was not completing enough ALARA reviews due to his inclination to re-visit the research done by others upon which he was to base his reviews. (Tr. 877-78) Michael Tullai, an ALARA coordinator, testified that the Complainant repeatedly referred to his degree and treated him "like a person of lower stature." (Tr. 1300) Likewise, Allen Treat, another employee in the ALARA radiological engineering unit, testified that the Complainant often referred to his engineering degree and noted that "he liked to hold it over us." (Tr. 1324) Treat further stated that the Complainant would stand behind Sun Lee during morning meetings, shake his head, roll his eyes, and smirk at Lee. (Tr. 1327) He testified that the Complainant created "a somewhat negative atmosphere, and . . . it was a burden, sometimes, to be around him." (Tr. 1328) Similarly, Marcia Balash, an administrative assistant in the radiation protection section, described the Complainant's behavior as "arrogant", and testified that he tried to take control of the safety meetings. (Tr. 1338) Although acknowledging that the Complainant was polite towards her, she found him to be "patronizing" and was uncomfortable working with him. (Tr. 1340) Balash testified that she was aware of the tension between the Complainant and Sun Lee, and that this created a stressful work environment. (Tr. 1341)

The Complainant testified that he believed his performance was about the same as the other members of the HPPE unit, and that his only problem was in understanding his role and the hierarchy of the unit. (Tr. 504) Furthermore, the Complainant testified that his work ethic was criticized because the accusers feared losing their jobs and did not want to take responsibility for the unit being behind schedule. (Tr. 1401-03)

During the course of the refueling outage, the Complainant expressed safety concerns regarding two incidents: the bellows decontamination and the drain down. In late January, the bellow cavities were to be emptied to decrease the amount of radiation to which workers in the area would be exposed. (Tr. 428-9) As a result of this activity being performed later than scheduled, the Complainant believed that the workers in the area were picking up larger doses of radioactivity than planned. (Tr. 429, 431) The Complainant informed Sun Lee and Donald Forbush of this development and was told by Sun Lee that a PIF[3] would be filed. (Tr. 431) The Complainant sent an e-mail inquiring into the status of this investigation a few days later, but Sun Lee did not reply. (Tr. 432)

On February 6, 1996, Pat Volza assigned the Complainant to evaluate the dose rates for draining the recirculation system piping in preparation for performing a chemical

decontamination. (Tr. 432) Removal of the water from the pipes, which acts as a shield, results in an increase in radiation exposure. Pat Volza wanted to know what the dose rates were going to be so as to determine whether work could be conducted contemporaneously with the drain down. (Tr. 435) Although unable to locate historical radiation surveys from prior drain downs, the Complainant concluded that the dose rates would increase to unacceptable levels based on his prior experience and private research. (Tr. 435-437) Nonetheless, Pat Volza decided to proceed with the drain down despite the Complainant's opinion. (Tr. 437) Although the evidence was unclear, it appears that the radiation levels during the drain down doubled in some areas while only marginally increasing in others. Regardless, the radiation levels never exceeded federal dose limits during the drain down. (Tr. 842, 1515)

Upset that management had proceeded with the drain down despite his recommendations, the Complainant met with Sun Lee and Pat Volza on February 7, 1996, to discuss how this decision was made. (Tr. 439-40) Pat Volza testified that the decision to proceed was a management decision made after several employees who had been present for previous outages opined that the dose would increase by only 25 to 33 percent. (Tr. 643-44) During this meeting, the Complainant had a heated exchange with Volza and Lee. Volza testified that the Complainant appeared "very emotional", "disturbed", and "very red-faced". (Tr. 650) According to Volza, the Complainant yelled at times, used abusive language, and accused him and Lee of lying. (Tr. 652) Likewise, Lee concurred that the Complainant threw a tantrum and accused them of lying. (Tr. 308-10) The Complainant acknowledged that he was upset, swore, raised his voice, was red, and his eyes were watering. (Tr. 471, 1404) The Complainant, however, denied cursing at Volza or calling him a liar. (Tr. 1404-1405) Based on the Complainant's conduct, Volza questioned the Complainant's emotional stability. (Tr. 651) He asked the Complainant whether he wanted to continue his employment at Perry, and requested a decision by the end of the day. (Tr. 653; RX. 12)

The Complainant and Pat Volza met next on February 12, 1996, to discuss their prior meeting. (RX. 12) The Complainant was apologetic and requested that he be left on his current assignment. (Tr. 653) Further, he presented Pat Volza with the information he relied upon in recommending against the drain down. (Tr. 1412) Pat Volza emphasized his concerns regarding the Complainant's conduct, emotional stability, his inability to accept management decisions, his inability to receive and accept critical feedback, his lack of trust and respect for his peers, and his lack of teamwork. (Tr. 654-56; RX. 12) The Complainant reiterated his desire to remain on this assignment, and was told that a decision would be reached after Pat Volza discussed the matter with Sun Lee and Craig Reiter. (Tr. 654; RX. 12)

The following day, Pat Volza informed the Complainant that management thought it best that he remain in the HPPE so as to salvage his reputation in the company. (Tr. 657, 1116, 1414; RX. 12) In addition, the Complainant was informed that a memo

documenting his conduct in the prior meetings would be placed in his supervisory file. (Tr. 470, 659) The Complainant protested this documentation as unjust and informed Pat Volza that he would take this issue up the chain of command. (Tr. 478, 659; RX. 12) Given the Complainant's response to the documentation, Pat Volza again expressed reservations about his conduct and told him that he would consult Human Resources to determine the next course of action. (Tr. 661; RX. 12)

On February 14, 1996, Pat Volza contacted Jim Dailey and Fran Szynal of Human Resources to discuss the Complainant. (Tr. 661; RX. 12) It was suggested that the facility ombudsman be contacted concerning this situation, which Pat Volza did without mentioning the name of the Complainant. (Tr. 662; RX. 12) Later that day, Pat Volza again met with the Complainant and told him that Human Resources felt that the actions being taken were proper. (Tr. 484; RX. 12) Pat Volza instructed the Complainant to contact both Jim Dailey and the ombudsman to discuss his issues. (Tr. 484, 664; RX. 12) With this, the Complainant responded that he was being harassed by Pat Volza and his management staff. (Tr. 663; RX. 12)

The next day, Volza met with Jim Dailey and Dick Brandt, the plant general manager, to discuss the Complainant's allegations and his concerns regarding the disruptive effect of the Complainant on the organization. (Tr. 665; RX. 12) At this meeting, Pat Volza was instructed to arrange a meeting between the Complainant and Jim Dailey to discuss his harassment allegations. (Tr. 666; RX. 12) The Complainant met with Jim Dailey on February 16, 1996. At some point, Pat Volza joined this meeting. (Tr. 500, 667; RX. 12) Pat Volza testified that the meeting was going well until the discussion turned to the Complainant's work in the HP Planning Section. (Tr. 500, 667; RX. 12) According to Volza, the Complainant accused management generally, and Don Forbush specifically, of intimidation based on their management styles. (Tr. 667; RX. 12) In the midst of these discussions, the Complainant got up and left. (Tr. 667; RX. 12)

On February 19, 1996, Sun Lee authored a memorandum at the direction of Pat Volza which proposed to document a coaching and counseling session performed by Sun Lee and Pat Volza. (CX. 5) This memorandum referenced five areas of concern regarding the Complainant's behavior. Id. Additionally, the memorandum states that the Complainant engaged in unacceptable behaviors during the session itself. Id. However, Sun Lee testified that he never attended this coaching and counseling session and was instructed to write this memorandum by Pat Volza in anticipation of such a session. (Tr. 96-102; CX. 7) Pat Volza testified that this session was intended to take place to address the Complainant's conduct but was put on hold by Human Resources in light of the investigation into the Complainant's harassment claim. (Tr. 669-70) This memorandum was placed in the Complainant's personnel file and was also sent to Human Resources. (CX. 7; Tr. 101) No explanation was offered as to why this memorandum included an anticipatory documentation of the Complainant's poor conduct.

On February 22, 1996, the Complainant wrote a five page report to the ombudsman documenting his concerns. (Tr. 504, 1417) The ombudsman, Larry Lindrose, met with the Complainant on March 8, 1996, as part of his investigation. On March 21, 1996, the ombudsman completed his investigation and published his report. (RX. 7) This report dealt with issues concerning the drain down, alleged intimidation by Radiation Protection Section management, alleged inappropriate management actions towards personnel in relation to the Complainant's HPES concerning tool decontamination, whether the Radiation Protection Section management had sufficient organizational freedom to implement the program in compliance with NRC requirements, and whether Radiation Protection Section management was threatening the Complainant. Id. After interviewing the Complainant for approximately three and one-half hours, interviewing an additional seven people, and spending in excess of 180 hours investigating the Complainant's concerns, the ombudsman found no documentation or indication that the Complainant's allegations had merit. (RX. 7; Tr. 1346-50)

Sun Lee, attempting to reconcile his differences with the Complainant, sent the Complainant an e-mail on February 28, 1996, suggesting that the past week's incidents be put behind them. (Tr. 505) According to the Complainant, when he and Sun Lee met he was informed that it was a coaching and counseling session concerning his behavior. (Tr. 505) Following the meeting, the Complainant called the ombudsman to find out what was going on. (Tr. 506) On behalf of the Complainant, the ombudsman contacted Pat Volza who told him that the meeting was the Complainant's six month review. (Tr. 506) The Complainant testified that neither the ombudsman nor Jim Dailey, from Human Resources, could find the provision which required the Complainant to undergo such a review. (Tr. 507-8) However, Fran Szynal, also of Human Resources, testified that six month reviews of other new employees were made, and that such reviews were recommended. (Supp. Tr. 222-23)

A letter prepared by Jim Daley dated February 28, 1996, states, "Pat Volza called and had been told by Tony Silakoski [the ombudsman at the time of Complainant's investigation] that he was not to speak to Kevin Doody until Mary O'Reilly, Legal Department, got back to him." (CX. 134)[4] The Complainant contends that this raises the issue of whether the Respondents testified truthfully regarding Ms. O'Reilly's involvement in the Complainant's termination and whether the ombudsman investigation was truly independent.

On March 26, 1996, Donald Forbush submitted a PIF based on the Complainant's conduct. (Tr. 510) The Complainant, however, was exonerated as the problem was one of procedure rather than his specific actions. (Tr. 927-28)

By memo dated April 18, 1996, Sun Lee forwarded documentation concerning the Complainant to the Respondent's legal department for review. (CX. 72) The memo stated that the Complainant had raised an ombudsman issue which was investigated and found to have no quality issues. Id.

In early May of 1996, an independent investigator was on-site from the Nuclear Safety Review Committee investigating concerns related to radiation protection and the refueling outage. (Tr. 521-22) The Complainant, feeling that his outage concerns had not been properly investigated and that he was being retaliated against, expressed his concerns to this investigator. (Tr. 525, 532)

On May 17, 1996, the Complainant met with Sun Lee and Jim Dailey to discuss his six-month performance review. The review, dated April 18, 1996, was not submitted six months after the Complainant's start date due to the refueling outage and the pending investigations related to the Complainant's harassment claims. (Tr. 128, 670) The Complainant was reviewed as having good technical skills but his behavior was found to be a problem, and his overall performance was rated as below expectations. (CX. 9) At this time, the memo written on February 19, 1996, was utilized to show the Complainant the areas for improvement in his conduct. (CX. 7) In a subsequent e-mail, Sun Lee characterized this meeting as both a performance review and a coaching and counseling session. Id.

In August 1996, the Complainant, believing that he was being harassed due to his disputes with management during the refueling outage and his related personnel actions, contacted the NRC with his concerns. (Tr. 527, 533-34) Also in August 1996, Sun Lee disciplined the Complainant for uttering the word "shit" in a conversation he was having with Howard Conrad. (Tr. 327, 922) The Complainant was later reprimanded by Sun Lee for uttering either "hell" or "damn" and "crap." (Tr. 534, 926) Lee said that he disciplined the Complainant for "use of profanity and an inability to stop when the profanity kept on persisting. . . . He just did not know when to stop and it became disruptive." (Tr. 325) The Complainant testified that he had never seen Lee correct other technicians who had used profanity, and that he had heard Lee himself use profanity. (Tr. 489-93) Similarly, George Sutton testified that he heard "a lot of foul language" at the plant, but never saw anyone reprimanded for it. (Tr. 765-68) Furthermore, Sutton once intentionally swore in front of Sun Lee, but Lee did not respond. (Tr. 766-67) Likewise, Howard Conrad testified that Lee corrected the Complainant for using profanity, despite using profanity himself and not correcting other people in the plant who used profanity. (Tr. 922-23, 926) Conrad did note, however, that Lee and Ed Gordon did eventually start disciplining other employees regarding their language. (Tr. 927, 950)

Around August 20, 1996, the Complainant inspected the corrective actions taken on the tool control process stemming from the HPES he completed the previous November. (Tr. 535) He prepared an e-mail criticizing an aspect of the corrective actions taken, and sent it to several plant personnel for comment. (Tr. 536) Subsequently, Sun Lee counseled the Complainant for sending a written document to another individual without first having the document reviewed by his organization. (Tr. 537) The Complainant believed that company policy did not require such review of an e-mail. (Tr. 538) Sun Lee released a memo on September 6, 1996, dealing with these corrective actions that addressed some of the Complainant's concerns. (Tr. 541; CX. 162) Sun Lee testified that

this memo was incorrectly dated March 6, 1996, an error which the Complainant alleged was done intentionally to portray him as bringing up issues that had already been resolved. (Tr. 63-66, 543)

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The Complainant met with Craig Reiter and Jim Dailey to discuss the removal of his six month performance review in late September or early October of 1996. (Tr. 1121-22) The only two concerns addressed by the Complainant stemmed from the six month review and his opinion that Sun Lee was a poor supervisor. (Tr. 1122-23) Craig Reiter attempted to alleviate both concerns by agreeing that the Complainant's six month review would not impact his annual review if his conduct was appropriate and that a consultant had been brought in to work with Sun Lee on his supervisory skills. Id.

The Complainant and Sun Lee met on November 14, 1996, for an interim performance review. (Tr. 266) Sun Lee testified that his intention was to discuss how the Complainant had made some progress regarding his behavior without referencing his six-month performance review. Id. The Complainant requested that his six-month review be removed from his records, but Sun Lee refused. (Tr. 267) At this point, the Complainant told Sun Lee that he was going to go to the NRC with his complaints. Lee responded that this was his prerogative. Id.

Later that month, the Complainant sought permission from Sun Lee to attend an off-site certification class in Boston, Massachusetts. (Tr. 1125) Sun Lee discussed this request with Craig Reiter who in turn discussed it with Dick Brandt. Id. Dick Brandt decided that the company should inquire into bringing the course to the facility so that more employees could attend. (Tr. 1126) Thus, the Complainant's request was denied. The Complainant objected to the company's response because he wished to be qualified in time for the next test and viewed this denial as an attempt to hold him back professionally. (Tr. 573, 1127, 1430-31) He arranged a meeting to discuss the issue with Craig Reiter and Sun Lee on December 4, 1996. According to Craig Reiter, the Complainant walked into the meeting and immediately started yelling at Sun Lee. (Tr. 1118-19) The Complainant then informed Sun Lee and Craig Reiter that he had taken his concerns of retaliation to the NRC. (Tr. 1430, 1536) Eventually, the Complainant was granted paid leave to attend the training at his own expense. (Tr. 1127)

On January 15, 1997, the Complainant received an e-mail from Sun Lee informing him that he, along with Robert Leib and Howard Conrad, had been assigned to join the Emergency Response Organization (ERO)[5] as a Radiation Monitoring Team (RMT) Leader. (CX. 14; Tr. 543) In response, the Complainant sent an e-mail to Sun Lee in which he expressed a concern with the manner in which he had been assigned and suggested that the RMT leader role should be filled with Senior HP technicians. (CX. 15) Sun Lee and Craig Reiter testified that the Complainant felt the work was beneath him and that there were better uses for his talent. (Tr. 295, 1137) The Complainant, however,

denied believing that the position was beneath him. (Tr. 1447) Rather, he expressed concern that he was not properly trained for the RMT assignment. (Tr. 1455-56)

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At Sun Lee's suggestion, the Complainant initiated a PIF regarding his concern over the use of Senior HP technicians as RMT leaders on January 22, 1997. (CX. 85; Tr. 163) The PIF investigation concluded that, "no changes solicited to the RMT Leader and other ERO positions are planned to be implemented until after the May 1997 ERO Training Drills, ... At this time, AREU personnel are not listed as qualified RMT Leaders in the Emergency Response Telephone Directory." (CX. 85) The PIF was then classified as a category 4 requiring no further follow-up. Id. Thus, the PIF investigation apparently concluded that the Complainant did indeed need training that would be forthcoming to serve as an RMT leader, but that he was not actively working as an RMT leader at that time. The Complainant, however, believing that the investigation had not sufficiently addressed his concerns, researched the issue at the public library on his own time. (Tr. 548) He discovered what, in his opinion, could be a potential violation of the plant's licensing criteria given his appointment as an RMT leader. (Tr. 549) The Complainant then e-mailed Sun Lee, Ed Gordon, and Craig Reiter on January 29, 1997, informed them of the results of his private research, and requested that the issue be re-examined. (CX. 17; Tr. 550) The Complainant testified that he did not pursue this issue further following this e-mail. (Tr. 550) Craig Reiter, however, testified that he was asked to intervene on behalf of Joe Anderson given the frequency with which the Complainant called after the PIF investigation was complete. (Tr. 1136) Similarly, Sun Lee testified that he was upset with the Complainant because the Complainant harassed Ed Gordon and Joe Anderson after the investigation of his PIF had been completed. (Tr. 193) The Respondent did implement a change in its emergency plan which made it possible for all qualified employees to be RMT leaders rather than just HP technicians. (Tr. 1024)

In late January of 1997, the Complainant suspected that he was going to be terminated and began carrying a tape recorder to protect himself. (Tr. 1436, 1441, 1532) The Complainant taped two or three conversations with Sun Lee as well as his termination meeting, but denied taping anyone without their knowledge. (Tr. 1438)

On January 30, 1997, the Complainant met with Sun Lee and Jim Dailey to discuss his one year performance review. (Tr. 207) The Complainant's annual performance review was signed and dated by Sun Lee on January 1, 1997. (CX. 20) Lee testified that he completed this review in November of 1996. (Tr. 221, 275) The Complainant was rated as meeting expectations and a note was made of his improving behaviors. (CX. 20) Sun Lee testified that the Complainant's rating improved because he sought to give him a fresh start in 1997. (Tr. 286) Craig Reiter acquiesced in this improved ranking as he believed that the Complainant had been restraining himself. (Tr. 1139) In addition to discussing this annual review, Sun Lee also informed the Complainant that he had been ranked in the bottom quartile of plant employees. (Tr. 208) The Complainant requested clarification as to how this ranking was compiled and how it would be utilized. (Tr. 290)

Craig Reiter testified that he instructed each of his supervisors to rank their employees based upon certain criteria and then the results were averaged. (Tr. 1141) Following this process, the results were discussed to assure that the averages had produced no anomalies. (Tr. 1142) Using this process, four supervisors rated the Complainant, on average, as a fourth quartile performer. (Tr. 292) Sun Lee testified that the Complainant became "enraged" and "extremely angry" over his ranking. (Tr. 290)

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Thereafter, the Complainant sent an e-mail requesting further information regarding how his ranking was determined and how it would be used. (CX. 22) Sun Lee testified, however, that all of this had been explained to the Complainant at the time the ranking was delivered. (Tr. 208) The Complainant testified that he told Sun Lee at this point that he had gone to the NRC. (Tr. 1430) Ed Gordon documented a confrontation with the Complainant on January 30, 1997, regarding the Complainant's further inquiries into the ranking system. (CX. 91; RX. 4) According to Gordon, he explained the ranking system to the Complainant, but the Complainant twisted his words to "make them sound derogatory and like personal attacks." (RX. 4) Gordon concluded that he was "beginning to doubt Mr. Doody's ability to make rational decisions in the workplace. His unwillingness to accept constructive criticism and his accusatory demeanor do not inspire confidence. His recent actions over the E-Plan have made me doubt his ability to base decisions on good HP judgment." Id. On March 10, 1997, the Complainant requested another meeting to discuss the ranking system, this time with Craig Reiter. (CX. 29)

In early February of 1997, the Complainant had a dispute with management over his volunteer work at the NBA Jam Session held in Cleveland. The Complainant was upset because the company was not giving him paid leave to work the event. (Tr. 1151) Craig Reiter testified that, in accordance with company policy, the Complainant was allowed to use vacation time to attend the event. (Tr. 1151-52)

On or about February 6, 1997, the Complainant met with Luw Myers, CEI's Vice-President. (Tr. 1472) At this meeting, the Complainant discussed his allegations of intimidating and harassing behavior by management in response to his raising concerns. (Tr. 1475-76) The Complainant was particularly upset about the incorporation of his six-month performance review into his annual review, which he understood would not be done. (Tr. 1477-78)

After this meeting, Myers expressed concerns about the Complainant's behavior to Fran Szynal in Perry's Human Resources Department and asked her to review the Complainant's file. (Supp. Tr. 227) Szynal subsequently conducted interviews relating to the Complainant's file and sent a copy of the file to Perry's legal department. (Supp. Tr. 227-28; CX. 127) Based on her review and analysis of the Complainant's record at Perry, and noting the "repeated efforts that had been made to try to correct the situation and the fact that there had not been progress", Szynal informed Myers that she did not believe the Complainant's situation was correctable. (Supp. Tr. 228) Szynal initially indicated that a

termination decision had been made on or about February 7, 1997, but then stated that it would be incorrect to say that a final decision was made to terminate the Complainant at that point. (Supp. Tr. 169, 171) She explained that the Complainant's satisfactory performance review from January 1997 presented a problem if he was to be terminated because it gave an appearance of inconsistency. (Supp. Tr. 170; CX. 124) Szynal noted in notes she prepared following her conversation with Myers that he had asked her "to check with legal and give him a recommendation on what we could do to make the problem to go away." (CX. 124; Tr. 178) Szynal's notes also quote Myers as saying, "the end objective, however, is to make this employee go away." (CX. 124) After

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consulting with Mary O'Reilly in the plant's legal department, it was decided that the Complainant would be given a final thirty day period to correct his behavior. (Supp. Tr. 170-71, 229-30) Szynal noted that this course of action was contrary to the recommendation of Dick Brant, who was of the opinion that the Complainant should have been terminated immediately. (Supp. Tr. 229)

Szynal further testified that, despite his allegedly aberrant behavior, the Complainant was never referred to the Employee Assistance Program, a program used to assist employees and management with personal problems. (Supp. Tr. 193) Szynal testified that this referral was not made because of concerns that a mandatory referral to counseling would further deteriorate the employer/employee relationship. (Supp. Tr. 226)

The Complainant received a memorandum from Sun Lee dated February 14, 1997, during a meeting attended by Sun Lee and Craig Reiter. (CX. 23, 88; Tr. 1145) Referencing a decline in his conduct, the Complainant was given thirty days to improve his behavior. The memorandum noted four areas that required improvement: the ability to receive constructive, critical supervisory evaluations and decisions; the ability to accept differing professional, management decisions; unprofessional behavior/emotional control; and teamwork. (CX. 23) The memorandum warned in conclusion that, "any single incident involving disruptive, unprofessional, uncooperative and insubordinate conduct will result in your immediate termination of employment with CEI. You must immediately improve your behaviors and attitude. You will be given 30 days to make the necessary improvements." Id. The Complainant subsequently photocopied this letter and distributed it to various personnel throughout the plant. (Tr. 1328-29, 1339-40)

Craig Reiter testified that the February 14, 1997, warning letter was prompted by behavioral problems that had been seen in the Complainant beginning in December 1996. (Tr. 1144) Reiter stated that "all of a sudden he was going downhill as far as his behavior, both his . . . aggression, his ability to interact with people. He was becoming very disruptive in the work place." (Tr. 1145)

The Complainant wrote a seven page letter to Luw Myers on February 17, 1997, requesting that he take action to prevent the Complainant from being subject to further

harassment and intimidation. (CX. 24) The Complainant never received a response from Myers regarding this letter. (Tr. 1057) Craig Reiter testified that he viewed the Complainant's letter to Myers as a violation of the 30-day letter, noting that acceptance of management decisions had been one of the Complainant's previous behavioral problems. (Tr. 1162) Reiter further noted that relations within the Planning Unit deteriorated greatly after the Complainant received the February 14, 1997, letter. (Tr. 1227) In addition, Reiter testified that the Complainant's contact with the NRC did not influence his subsequent decisions regarding the Complainant's employment. (Tr. 1218) Likewise, Fran Szynal testified that the Complainant's raising of safety concerns was not a factor in the decision to terminate his employment. (Supp. Tr. 230)

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On March 4, 1997, the Complainant received an improvement plan by which he was to demonstrate the progress he was making in his behavior. (Tr. 239, 552; CX. 25) The Complainant sent two e-mails to Sun Lee on March 6, 1997, concerning his improvement plan. The first requested clarification of the conduct in which he was prohibited from engaging. (CX. 28) The second was a notice to Sun Lee that the Complainant had notified his co-workers that he would no longer be joking with them so as not to be viewed as engaging in unprofessional conduct. (CX. 27) These e-mails, particularly the second, could easily be construed as being derisive given the relationship between the Complainant and management at the time it was written. The Complainant, however, denied that he was making light of the company's directives. (Tr. 1484) Craig Reiter testified that he did not see the Complainant attempting to comply with his thirty-day letter, and described the Complainant's efforts as "malicious compliance." (Tr. 1157) The Complainant testified that he complied with the terms of the performance improvement plan and received no negative feedback during this thirty-day time period. (Tr. 1042)

In an e-mail dated March 5, 1997, the Complainant noted that he is scheduled to participate as an RMT leader in a training drill scheduled for May 7, 1997, and inquired whether he would receive training for this position. (RX. 22, section 3, ex. 12)

On March 19, 1997, the Complainant was escorted to Human Resources by Craig Reiter for a meeting. He was informed by William Kanda, a plant director, that his progress was insufficient on his improvement plan and he was being terminated. (Tr. 575) Thereafter, the Complainant filed the present action under the Energy Reorganization Act.

Following the initial hearing in this matter, the Complainant submitted a Motion to Reopen Proceedings and requested that he be allowed to submit evidence that the Respondent had falsified training records related to his RMT leader assignment. (AX. 5) In addition, the Complainant averred that the Respondent had withheld e-mail records that were purported to have been deleted. Id. The Complainant's Motion was granted, and the record was reopened with respect to the issues surrounding the documentary evidence which had been purported to have been falsified or destroyed. (AX. 11)

At the second hearing in this matter, it was revealed that Ken Weirman, Perry's emergency plant responsible instructor, had falsified training materials that the Complainant, along with Howard Conrad, and Robert Leib, should have received prior to becoming RMT leaders. (Supp. Tr. 32-34; CX. 115-119) Weirman testified that he had falsified and forged these documents on January 14 or 15 of 1997. (Supp. Tr. 34) Weirman was apparently motivated by time constraints, testifying that he forged the signatures and falsified the documents rather than seek a waiver from the Complainant, Conrad, and Leib, because of the time it would have taken to get the required signatures. (Supp. Tr. 50, 91) He stated that, "I needed to get training done for a lot of people at that time," but acknowledged that January of 1997 was not his busiest time of the year. (Supp. Tr. 51, 53) Weirman testified that he acted alone, was not directed to falsify any document by anyone at Perry, and no one else at Perry was aware of his actions until he admitted them. (Supp.

Tr. 57-58, 84; RX. 22) Weirman testified that April of 1998 was the first time he admitted to forging the signatures and falsifying the documents, at which time he made a sworn statement and resigned from the Perry Plant. (Supp. Tr. 60, 84; RX. 22)

The Complainant testified that he first learned that certain of his training records at Perry had been falsified after he had been terminated, and that he first gave notice to Perry of the falsification in July of 1997. (Supp. Tr. 152)

Luw Myers testified that he first learned that documents relating to the Complainant's RMT training had been falsified and forged in April 1998. (Supp. Tr. 255-56) Upon learning of this, an investigation was conducted which produced a report concluding that certain of the Complainant's training records had indeed been falsified and forged. (Supp. Tr. 258; RX. 22) Although Ken Weirman initially denied falsifying the RMT training documents, he eventually admitted to doing so. (RX. 22) The investigation revealed that the Complainant, Howard Conrad, and Robert Leib had not received the RMT Leader training at the time of the Complainant's termination on March 19, 1997, but that Conrad and Leib did receive the training in April of 1997. (RX. 22) These findings were then turned over to the NRC for further action. (Supp. Tr. 258) Myers testified that the allegations relating to the Complainant's training records had no bearing in the decision to terminate his employment. (Supp. Tr. 258, 261)

Ken Freeman, the training coordinator for the radiation protection section, submitted a request that the Complainant, Howard Conrad, and Robert Leib receive RMT training to Ken Weirman sometime after January 31, 1997. (Supp. Tr. 269; RX. 18) Freeman testified that he had expected the training to occur sometime before April of 1997. (Supp. Tr. 271) Freeman further testified that he had no knowledge of the falsification of the Complainant's training documents prior to his termination. (Supp. Tr. 272)

Timothy Corbett, the supervisor of support services in the Perry training section, testified that he was responsible for ensuring that records are turned over and properly maintained. (Supp. Tr. 279) He said that he checked the forged documents, but did not verify the accuracy of the signatures and had no suspicion that the documents were forged or inaccurate. (Supp. Tr. 281)

Craig Reiter testified that the Complainant was not listed as a radiation monitoring team leader in the 1997 emergency response telephone directory which lists the radiation monitoring teams on active call status. (Supp. Tr. 314; RX. 13-17) Reiter further testified that he was unaware that any of the Complainant's training records had been forged or falsified prior to his termination, and that the Complainant's RMT leader training played no role in the decision to terminate his employment. (Supp. Tr. 321) Likewise, Fran Szynal stated that she was unaware of the forgery of the Complainant's name on the training documents. (Supp. Tr. 230-31)

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CONCLUSIONS OF LAW:

The ERA prohibits discrimination or retaliation against employees who, *inter alia*, engaged in the following acts:

> (A) notified his employer of an alleged violation of this chapter . . . ;
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> * * *
>
> (D) commenced, caused to be commenced, or is about to commence or caused to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter;
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> * * *
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 *et seq.*].

42 U.S.C. §5851(a)(1)(A)-(F).

The Complainant has alleged that the Respondent unlawfully discriminated against him in the following ways:

> (1) Sun Lee's criticism of the Complainant's team work in November of 1995 (Tr. 411);
> (2) The Complainant's assignment to the HPPE unit in January of 1996 (Tr. 1417);
> (3) Don Forbush's criticism of the Complainant's work output in January of 1996 (Tr. 424- 25);
> (4) Pat Volza's criticisms of the Complainant following the February 7, 1996 meeting (Tr. 470, 478);

(5) The negative six month performance review the Complainant received in May of 1996 (CX. 9);
(6) Sun Lee's reprimand of the Complainant for using vulgar language in August of 1996 (Tr. 489-93);
(7) Sun Lee's criticism of the Complainant in August of 1996 for circulating a tool PIF e-mail prior to getting approval from management (Tr. 535-41);
(8) The Respondent's denial of the Complainant's request for paid ABHP training in December of 1996 (Tr. 1125-29);

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(9) The Complainant's fourth quartile ranking in his January 1997 annual review;
(10) The 30 day letter the Complainant received on February 14, 1997; and,
(11) The Complainant's termination on March 19, 1997.

In the Respondent's Post-Hearing Brief, it is alleged that several of the Complainant's allegations of discrimination or retaliation are time barred by the ERA's 180 day statute of limitations. See 42 U.S.C. §5851 (b)(1). As the Complainant filed his discrimination complaint on March 31, 1997, any allegations of discrimination that occurred more than 180 days prior to this date are outside the statute of limitations. See Hill v. U.S. Dept. of Labor, 65 F.3d 1331, 1335 (6th Cir. 1995)(the statute of limitation begins to run when the alleged discriminatory act occurs). Thus, to the extent the Complainant's allegations concern discriminatory or retaliatory acts that occurred prior to October 2, 1996, they are time barred as an independent basis for an ERA claim. These alleged incidents, however, will be considered as evidence in resolving the timely filed claim at issue.

Before considering the merits of the claim, it should be noted that my jurisdiction is limited to deciding whether the Complainant was discriminated against due to protected activity under the ERA. I cannot address whether the Respondent took adverse action against the Complainant for reasons unrelated to protected activity under the ERA, or whether the Respondent was acting wisely or appropriately in taking such action. The Respondent was entitled to fire the Complainant "for good reasons, bad reasons, or no reason," so long as it was not a discriminatory reason. Collins v. Florida Power Corp., 91-ERA-47 (Sec'y, May 15, 1995). Thus, my inquiry must focus solely on whether the Complainant's protected activity was the reason for the adverse action taken against him.

To establish a *prima facie* ERA action, the Complainant must set forth facts sufficient to justify an inference of retaliatory discrimination due to conduct protected under the ERA. See Bartlik v. U.S. Dept. of Labor, 73 F.3d 100, 103, n. 6 (6th Cir. 1996), *citing* DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). The respondent may then rebut the Complainant's *prima facie* showing by presenting evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. See Kettl v. Gulf States Utils. Co., 92-ERA-16, (Sec'y, May 31, 1995), *citing* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). The complainant must then establish that the employer's proffered reasons for the adverse action were merely a pretext for retaliation. Id. "[I]t is not enough for the [Complainant] to show that a reason given for a job action is not just, or fair, or sensible . . . [rather,] he must show that the explanation is a 'phony reason.'" Pignato v.

Am. Trans Air, Inc., 14 F.3d 342, 349 (7th Cir. 1994). At all times, the Complainant has the burden of establishing that the real reason for his discharge was discriminatory. Kettl v. Gulf States, 92-ERA-16.

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In cases where the employer asserts a non-discriminatory reason for discharge, however, it is not necessary to engage in an analysis of the elements of a *prima facie* case. See Carroll v. Bechtel Power Corp., 91-ERA-46, (Sec'y, Feb. 15, 1995), *aff'd sub nom.* Bechtel Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996); Kettl v. Gulf States Utils. Co., 92-ERA-16 (Sec'y, May 31, 1995); Jackson v. Ketchikan Pulp Co., 93-WPC-7 (Sec'y, Mar. 4, 1996). When a respondent produces evidence that the complainant was subjected to an adverse action for a legitimate, nondiscriminatory reason, addressing whether the complainant presented a *prima facie* case is no longer useful. See Kettl, 92-ERA-33 at 6. If a complainant cannot prevail on the ultimate question of liability, it does not matter whether he has presented a *prima facie* case. Id. Thus, in such a situation the Administrative Law Judge can make a direct inquiry into whether a preponderance of the evidence establishes that the employer's reason is pretextual. Jackson, 93-WPC-7 at 6, n. 1.

I note that this is not a case in which a "dual motive" analysis should be applied. In a "dual motive" case, if the complainant proves by a preponderance of the evidence that illegitimate reasons played a part in the employer's decision, the employer then has the burden of demonstrating by clear and convincing evidence that it would have taken the adverse action against the employee for a legitimate reason alone. See Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y, 1995); Dysert v. U.S. Secretary of Labor, 105 F.3d 607, 610, n. 3 (11th Cir. 1997). However, where the complainant contends that the employer's motives were wholly retaliatory and the employer contends that its motives were wholly legitimate, neither party is relying on a "dual motive" theory in advancing its case. McCuistion v. Tennessee Valley Auth., 89-ERA-6, n. 1, (Sec'y, Nov. 13, 1991). In such a case, use of the "pretext" legal discrimination model is appropriate because it focuses on determining the employer's true motivation rather than weighing competing motivations. In the present case, the Complainant contends that the Respondent's motives were retaliatory, and the Respondent contends that its motives were entirely legitimate. Thus, I find that the "pretextual" analysis discussed above should be applied.[6]

In the present case, the Respondent has alleged that adverse action was taken against the Complainant due to his continued disruptive and unprofessional conduct. If true, this reason is a legitimate, nondiscriminatory basis for the Respondent's decision to terminate the Complainant. Therefore, the issue remains whether the Complainant can prove, by a preponderance of the evidence, that the action of the Respondent was retaliatory and not based upon legitimate, nondiscriminatory reasons.

The Complainant contends that the Respondent unlawfully discriminated against him by denying his request to attend an off-site ABHP certification class. (Tr. 1125-27) The

Complainant averred that his request was denied because the Respondent wished to hold him back

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professionally. (CX. 75; Tr. 573, 1127, 1430-31) The Respondent, however, presented testimony that the Complainant's request was denied due to the Respondent's interest in bringing the certification course to the plant site, thereby allowing more of the plant's employees to attend the training. (Tr. 1126) I find the evidence presented by the Complainant in this regard to be credible. There is nothing suggesting that the Complainant had ulterior motives other than the charge itself. There is no evidence, for example, that other employees were given paid leave to attend the off-site training. Moreover, the Complainant was eventually granted paid leave to attend the training at his own expense. (Tr. 1127) Therefore, I find that the Respondent has presented a legitimate, nondiscriminatory reason for denying the Complainant's request, and there is no evidence that this reason is pretextual.

Next, the Complainant contends that the fourth quartile ranking he received in his January 1997 annual review meeting constitutes retaliation for raising safety concerns, particularly his concerns regarding his assignment to the RMT leader position. The Complainant's supervisor, Sun Lee, testified that the other plant employees were ranked and informed of their ranking in the same manner that the Complainant was. (Tr. 218-19) Thus, it does not appear that the Complainant was subject to disparate treatment by having his performance ranked. Moreover, the Respondent presents ample evidence to justify the Complainant's fourth quartile ranking. Over the previous year, the Complainant had sworn at supervisors, angrily walked out of a meeting with supervisors, and responded hostilely when a supervisor refused to remove the six-month review documenting this conduct from his records. (Tr. 266-67, 471, 500, 667, 1404; RX. 12) In addition, three of the Complainant's co-workers, Michael Tullai, Allen Treat, and Marcia Balash, testified that the Complainant was condescending, disrespectful towards his supervisor, and created a negative work environment. (Tr. 1300, 1327-28, 1341) Given this conduct, it is not difficult to believe that the Complainant would be one of the Respondent's lower-ranked employees. The Complainant presents no evidence that he was ranked below poorer performing employees or that his ranking was undeserved. Furthermore, if the Respondent was attempting to retaliate against the Complainant by giving him a low ranking, it would not simultaneously give the Complainant an annual review in which it was found that he "meets expectations." Finally, I note that the Complainant's fourth quartile ranking is not necessarily inconsistent with the "meets expectations" performance review he was given at the same time. Being ranked in the fourth quartile does not mean that one does not meet expectations, it simply means that three quarters of the plant's employees are ranked higher. Therefore, I find that the Respondent has presented legitimate, nondiscriminatory reasons for ranking the Complainant in the fourth quartile of employees, and there is no persuasive evidence that this explanation is pretextual.

The Complainant further contends that the 30 day warning letter he received on February 14, 1997, and his termination on March 19, 1997, constitutes unlawful retaliation. The Respondent, however, asserts that this warning letter was warranted due to a decline in the Complainant's conduct. Similarly, the Respondent claims that the Complainant's termination was warranted as he did not improve his conduct in accordance with this letter.

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The Respondent's position is supported by the testimony of Sun Lee, who noted "a degradation in [the Complainant's] behavior" from November through January or early February of 1997. (Tr. 282) Likewise, Craig Reiter testified that the Complainant's behavior "was going downhill" and that he was "becoming very disruptive in the work place." (Tr. 1144-45) In support of this contention, the Respondent refers to the belligerent manner in which the Complainant behaved upon being denied leave to attend the ABHP training and upon learning of his fourth quartile ranking. (Tr. 1118-19, 290) Moreover, Ed Gordon documented a run-in with the Complainant regarding his fourth quartile ranking. (RX. 4) Rather than presenting himself in a professional manner, the Complainant behaved so as to cause Gordon to question the Complainant's judgment and "to doubt [the Complainant's] ability to make rational decisions in the workplace." (RX. 4)

The Respondent's characterization of the Complainant's behavior is further buttressed by testimony that the Complainant began carrying a tape recorder and recording conversations with co-workers in January of 1997. (Tr. 1436-41, 1532) Although the Complainant did not record anyone without his or her knowledge, I find that such conduct could be reasonably perceived as being disruptive to the workplace.

Furthermore, the Respondent contends that the Complainant did not improve his conduct in accordance with the warning letter he was given on February 14, 1997. According to the Respondent, the Complainant mocked the contents of the letter by photocopying it and distributing it to co-workers. (Tr. 1328-29, 1339-40) Similarly, the Respondent contends that the Complainant was derisive towards management in the e-mail sent on March 6, 1997, informing co- workers that he would no longer be joking with them so as not to be viewed as engaging in unprofessional conduct. (CX. 28) Although the Complainant denied he was making light of the Respondent's directives, I find that the Respondent could reasonably construe this e-mail as being derisive towards management given the tense relationship that existed between them. The Complainant's conduct was interpreted by the Respondent as being "malicious compliance" rather than a sincere attempt to comply with the Respondent's directives. (Tr. 1157) Moreover, there is testimony that the relations in the Complainant's work unit deteriorated at this time. (Tr. 1227) Thus, the Respondent has set forth a legitimate, nondiscriminatory reason for terminating the Respondent.

The Complainant theorizes that the Respondent terminated him in order to prevent the discovery of his forged and falsified RMT leader training records. Apparently, the Complainant argues either that the Respondent intentionally had Ken Weirman falsify the Complainant's documents and then terminated him in order to avoid discovery, or that the Respondent terminated the Complainant after discovering Weirman's activity so as to avoid exposure. While the fact that such activity occurred naturally raises suspicions, upon consideration I do not find any nexus between the falsification of the Complainant's RMT credentials and the adverse action taken against him.

First, there is no persuasive evidence that anyone other than Ken Weirman at the Perry plant knew of the falsification prior to the Complainant's termination. Weirman testified

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that he acted alone in falsifying the Complainant's RMT credentials and told no one of his conduct until April 1998. (Supp. Tr. 60, 84; RX. 22) Further, Luw Myers, Craig Reiter, Ken Freeman, and Fran Szynal all testified that they had no knowledge of Weirman's actions prior to the Complainant's termination. (Supp. Tr. 230-31, 255-56, 272, 321) This testimony is corroborated by the Respondent's investigation report prepared by Larry Lindrose. (RX. 22) This report documents in detail evidence that Weirman had falsified and forged the training documents of the Complainant, Leib, and Conrad. If the Respondent was engaged in a coverup, it is unlikely that it would document what it had tried to coverup and then turn this documentation over to the NRC.

Furthermore, I find it particularly relevant that two of the Complainant's co- workers, Robert Leib and Howard Conrad, were also assigned to be RMT leaders and also had their training records falsified. (RX. 22) If the Respondent terminated the Complainant in order to coverup the falsification of his training documents, it would be logical that the Respondent would also wish to coverup the falsification of Leib's and Conrad's training documents. Leib and Conrad, however, were not terminated, and there is nothing to indicate that they were silenced in any way. In fact, Leib and Conrad were given the RMT training in April of 1997, as the Complainant likely would have been had he not been terminated. This suggests that, contrary to the Complainant's argument, there was no rush to have the Complainant, Leib, and Conrad declared RMT leaders. Indeed, the e-mail the Complainant sent on March 5, 1997, in which he notes that he is scheduled to participate as an RMT leader in a training drill scheduled for May 7, 1997, and inquires whether he will get training for this position, indicates that the Complainant had not begun acting as an RMT leader at the time of his termination. (RX. 22, section 3, Ex. 12) Thus, the most probable conclusion that can be drawn from the evidence is that Ken Weirman acted alone in falsely crediting the Complainant's RMT credentials, and that this falsification had nothing to do with any adverse action taken against the Complainant.

The Sixth Circuit addressed a similar case in American Nuclear Resources v. U.S. Dept. of Labor, 314 F.3d 1291 (6th Cir. 1998), where a terminated employee accused of

disruptive behavior brought an ERA action. The Court held that "an employer may terminate an employee who behaves inappropriately, even if that behavior relates to a legitimate safety concern." Id. at 1295, citing Dunham v. Brock, 794 F.2d 1037, 1041 (5th Cir. 1986)(holding that "An otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the bounds of conduct.") The Court then dismissed the case after finding that the Complainant had been terminated due to interpersonal problems rather than for raising safety concerns. American Nuclear Resources, 314 F.3d at 1296. Likewise, in the present case there is substantial evidence that the Complainant was terminated due to unprofessional and disruptive behavior rather than for raising safety concerns.

In his supplemental brief, the Complainant cites Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1513 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986) for the holding that "an unrealistically short period of time allowed a Complainant to comply with a management ultimatum is evidence of pretext." The facts in Kansas Gas, however, are quite different from the present case. In Kansas Gas, a safety inspector who reported a safety violation was told that he had 48 hours to produce documentation verifying his qualifications or be fired. Id. at 1508. The inspector was then terminated, and his employer

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refused to rehire him despite production of the documents two weeks later. Id. On these facts, the Court found that the 48 hour time period was a pretext for unlawful retaliation. Relying on this holding, the Complainant refers to the thirty days he was given to improve his conduct and asserts: "Clearly, this was not sufficient time to comply with 'mangement directives.'" This argument, however, is patently absurd. Unlike producing documents, behaving in a professional manner does not require a lengthy amount of time. Rather, it simply requires a willingness to conform to required standards. At any rate, it cannot rationally be argued that thirty days is an unrealistically short amount of time to improve one's behavior.

The Complainant further argues that his case is directly on point with Keene v. Ebasco Constructors, Inc., 1995-ERA-4 (ARB, Feb. 19, 1997), where an employee was found to have been discriminated against based on his employer's unsupported explanations and an unexplained downgrade in the employee's performance rating. In contrast to Keene, however, the actions the Respondent took against the Complainant are neither unsupported nor unexplained. On the contrary, the Respondent has presented sufficient evidence to establish that the Complainant repeatedly behaved in an unprofessional manner when dealing with management and created a negative work environment. Likewise, as discussed above, the Complainant's ranking in the fourth quartile of plant employees was clearly explained and justified.

The Complainant also argues that the Respondent had already decided to terminate him at the time he was given the 30 day warning letter on February 14, 1997, rather than the

day he was formally terminated on March 19, 1997. Even if true, this argument is not particularly relevant. Whether the Respondent wished to terminate the Complainant is not at issue. Obviously they did, or the Complainant would not have been terminated. What is at issue is *why* the Respondent wished to terminate the Complainant. To prevail in this action the Respondent must prove that the Complainant was terminated due to activity protected under the ERA, and this the Complainant has failed to do.

In conclusion, I find that the Respondent articulated legitimate, nondiscriminatory reasons for taking adverse action against the Complainant. I further find the evidence of record insufficient to establish that these reasons are pretextual or that the Complainant was subjected to adverse action for engaging in protected activity.

RECOMMENDED ORDER

It is hereby RECOMMENDED that the complaint of Kevin R. Doody be DISMISSED.

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1] 1 In this Recommended Decision and Order, "AX." refers to the Administrative exhibits, "CX." refers to the Complainant's exhibits, "RX." refers to the Respondent's exhibits, "Tr." refers to the transcript of the first hearing, and "Supp. Tr." refers to the transcript of the second hearing.

[2] 2ALARA is an acronym that stands for "as low as reasonably achievable." This standard mandates that licensees keep radiation exposures to a minimum taking into account a myriad of factors, some of which are independent of worker safety. See 10 C.F.R. § 20.1101(b).

[3] 3A PIF, or "Potential Issue Form", is an organizational tool used to classify and resolve issues dealing with personnel and procedures within the plant.

[4] 4The Respondent objected to this evidence, averring that it falls outside the scope of the second trial. (Supp. Tr. 112-127) As I find that it does not alter the outcome of my Recommended Decision, however, I will err on the side of inclusion.

[5] 5The ERO is the plant's organization designed to deal with potential emergency situations.

[6] 6Assuming, *arguendo*, that a dual motive analysis was found to be appropriate, I find the evidence presented by the Respondent sufficient to demonstrate by clear and convincing evidence that it would have terminated the Complainant based on legitimate reasons alone.